

## THE LAW OF CONTRACTS, TRUSTS AND CORPORATIONS AS CRITERIA OF TAX LIABILITY

THE HON WILLIAM GUMMOW AC\*

*The general law of contracts, trusts and corporations may be thought to provide clear and stable criteria for the operation of revenue laws. But experience suggests this expectation may be overoptimistic. This is not to urge increased legislative resort to criteria preferring substance over form, with the attendant temptation to impose what constitutional doctrine would stigmatise as arbitrary imposts. It is to urge legislative vigilance in the selection of particular criteria to implement policy objectives, and to reiterate the necessity for a good tax lawyer to keep up-to-date with the general law.*

### CONTENTS

I	Introduction.....	835
II	The Constitution .....	835
III	Form and Substance .....	837
IV	General Considerations.....	838
V	‘Consideration’.....	839
VI	What Is a ‘Trust’?.....	839
VII	Assignments.....	840
VIII	Beneficial Ownership .....	842
IX	Executory Contracts .....	843
X	Trustee Income .....	845
XI	Temporal Issues .....	846
XII	Legislative Responses.....	848
XIII	Conclusion .....	849

\* BA, LLB, Hon LLD (Syd). Professor of Law, Sydney Law School, The University of Sydney and ANU College of Law, The Australian National University; Non-Permanent Justice of the Hong Kong Court of Final Appeal; Former Justice of the High Court of Australia. This paper was originally presented by the author as ‘The Law of Contracts, Companies and Trusts as Criteria for Tax Liability’ (Speech delivered at the 9<sup>th</sup> Annual Tax Lecture, Melbourne Law School, 12 September 2013).

## I INTRODUCTION

The theme of this paper is the imperative need for tax lawyers, including officers of the Commissioner and other revenue authorities, to maintain a well-grounded working knowledge of the general law as it applies from time to time and operates with tax law in its most specific sense. Some reference will be made to state revenue law but the principal concern is with federal taxation.

## II THE CONSTITUTION

It is appropriate to begin with what, in *Federal Commissioner of Taxation v Futuris Corporation Ltd*, Kirby J called the ‘constitutional moorings’ which inform the meaning of federal legislation.<sup>1</sup> The power conferred upon the Parliament by s 51(ii) of the *Constitution* is to make laws with respect to ‘taxation; but so as not to discriminate between States or parts of States’.

The importance of criteria selected for the operation of the law imposing ‘taxation’ is immediately apparent. This is so, notwithstanding the proposition, expressed by Aickin J in *General Practitioners Society v Commonwealth*, that ‘the tax power is not limited to old or well-known taxes but extends to any form of tax which ingenuity may devise’.<sup>2</sup>

The essential role played by legislative criteria appears from three steps in the reasoning of Gibbs CJ, Wilson, Deane, Dawson JJ in *MacCormick v Federal Commissioner of Taxation*.<sup>3</sup> The first step states the major premise:

where, as is ordinarily the case under the Commonwealth *Constitution*, the validity of the law depends upon its characterization as a law with respect to a particular subject-matter by reference to the criteria which the law itself fixes for its operation, the law cannot be so characterized if, in effect, it goes on to provide that it will have that operation regardless of whether those criteria are, in truth, satisfied.<sup>4</sup>

The second step fixes upon the distinction between a tax and an ‘arbitrary exaction’:

<sup>1</sup> (2008) 237 CLR 146, 170 [78].

<sup>2</sup> (1980) 145 CLR 532, 569.

<sup>3</sup> (1984) 158 CLR 622.

<sup>4</sup> *Ibid* 640.

For an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which liability to pay the tax is imposed.<sup>5</sup>

The third step deals with the manner of application of those criteria and explains the term ‘incontestable tax’:

Not only must it be possible to point to the criteria themselves, but it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner. In *Giris Pty Ltd v Federal Commissioner of Taxation* Kitto J pointed out that the expression ‘incontestable tax’ in the sense in which it is used in [*Deputy Federal Commissioner of Taxation v*] *Hankin* and [*Deputy Federal Commissioner of Taxation v*] *Brown* ‘refers to a tax provided for by a law which, while making the taxpayer’s liability depend upon specified criteria, purports to deny him all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case.’ The purported tax is thereby converted to an impost which is made payable regardless of whether the circumstances of the case satisfy the criteria relied upon for characterization of the impost as a tax and for characterization of the law which imposes it as a law with respect to taxation. Such an incontestable impost is not a tax in the constitutional sense and a law imposing such an impost is not a law with respect to taxation within s 51(ii). It is in this sense that an incontestable tax is invalid.<sup>6</sup>

This third step has caused difficulty where the operation of the law turns upon the exercise of a discretion conferred by that law upon the Commissioner. However, it is settled that whatever the width of the discretion, its exercise is judicially examinable to determine whether the Commissioner has exceeded the limits which may be discerned from the legislation.<sup>7</sup>

The constitutional imperatives were succinctly expressed in the joint reasons of the whole Court in a transfer pricing case, *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation*,<sup>8</sup> where their Honours said:

First, for an impost to satisfy the description of taxation in s 51(ii) of the *Constitution* it must be possible to distinguish it from an arbitrary exaction. Secondly, it must be possible to point to the criteria by which the Parliament im-

<sup>5</sup> Ibid.

<sup>6</sup> Ibid 640–1 (citations omitted).

<sup>7</sup> *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678.

<sup>8</sup> (2008) 237 CLR 198. See also *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 170–1 [79]–[82] (Kirby J).

poses liability to pay the tax; but this does not deny that the incidence of a tax may be made dependent upon the formation of an opinion by the Commissioner. Thirdly, the application of the criteria of liability must not involve the imposition of liability in an arbitrary or capricious manner; that is to say, the law must not purport to deny to the taxpayer 'all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case'.<sup>9</sup>

These constitutional imperatives may be seen to encourage the engagement by the legislation of criteria which have an appearance of clarity and stability because they are taken from the general law. So it is that many leading cases expounding concepts and institutions of the general law are revenue cases. They include *Norman v Federal Commissioner of Taxation*,<sup>10</sup> *Bluebottle UK Ltd v Deputy Federal Commissioner of Taxation*,<sup>11</sup> *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd*,<sup>12</sup> *Aid/Watch Inc v Federal Commissioner of Taxation*,<sup>13</sup> to each of which further reference is made in this paper.

### III FORM AND SUBSTANCE

Allied to this attraction of the general law, has been a canon of statutory construction which at one stage almost assumed the higher status of a constitutional imperative. Regard was to be had solely to the 'legal form' of a transaction, rather than to 'substance', 'end result' or 'economic equivalence'. This restriction was associated with *Inland Revenue Commissioners v Duke of Westminster*<sup>14</sup> and thereafter with the *Europa Oil* litigation, namely *Inland Revenue Commissioner v Europa Oil (NZ) Ltd* ('Europa Oil No 1')<sup>15</sup> and *Europa Oil (NZ) Ltd v Inland Revenue Commissioner* ('Europa Oil No 2').<sup>16</sup> The *Europa Oil* litigation twice reached the Privy Council from New Zealand and was heard by Boards including Sir Frank Kitto in *Europa Oil No 1* and Sir Garfield Barwick in *Europa Oil No 2*. Back in the High Court, Barwick CJ later described the reasoning in these cases as 'still basic in this area of the

<sup>9</sup> (2008) 237 CLR 198, 204 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

<sup>10</sup> (1963) 109 CLR 9 ('assignments').

<sup>11</sup> (2007) 232 CLR 598 ('dividends').

<sup>12</sup> (2008) 236 CLR 342 ('deposits').

<sup>13</sup> (2010) 241 CLR 539 ('charities').

<sup>14</sup> [1936] AC 1, 19–20 (Lord Tomlin), 24–5 (Lord Russell), 29–30 (Lord Wright).

<sup>15</sup> [1971] AC 760.

<sup>16</sup> (1976) 1 WLR 464.

law'.<sup>17</sup> As is well-known, this approach contributed to the demise of s 260 of the *Income Tax Assessment Act 1936* (Cth) ('ITAA 1936'), and its replacement by pt IVA.<sup>18</sup> As Lehane J observed in *Richard Walter Pty Ltd v Federal Commissioner of Taxation*, many tax schemes are designed to have an otherwise inexplicable legal effect precisely because of the fiscal objectives being pursued.<sup>19</sup>

This chain of events in Australia may be contrasted to what followed in the United Kingdom. The starting point appears to be *W T Ramsay v Inland Revenue Commissioners*.<sup>20</sup> Lord Wilberforce had dissented in *Europa Oil No 2*, and had stressed the distinction drawn by Dixon J in *Hallstrom Pty Ltd v Federal Commissioner of Taxation* between 'a practical and business point of view' and 'the juristic classification of ... legal rights'.<sup>21</sup> Lord Wilberforce, perhaps, as an equity lawyer, was inclined to prefer substance over form. He now led the way with the development of what has become known as the 'fiscal nullity' doctrine.<sup>22</sup>

In Australia, the constitutional considerations outlined above have encouraged the adoption of legislative criteria drawn from the general law; this practice is apt to emphasise the importance of legal form taken by transactions. The cases dealing with assignments of income, discussed below, are striking examples of this.

#### IV GENERAL CONSIDERATIONS

There are several points to be made in what now follows in this paper. First, the application in revenue law of criteria drawn from the general law may 'breed confusion'.<sup>23</sup> This may be because the general law uses a term (eg, 'consideration') in several distinct senses; because the general law itself is in an unsettled state (as with the law of assignments 50 years ago); because legislation in some but not all the states may have modified the general law (eg, respecting trustees); or because revenue law and the general law (eg, of trusts)

<sup>17</sup> *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314, 321.

<sup>18</sup> See *Income Tax Laws Amendment Act (No 2) 1981* (Cth) ss 7, 10.

<sup>19</sup> (1996) 67 FCR 243, 267–8.

<sup>20</sup> [1982] AC 300. See further *Furniss v Dawson* [1984] AC 474; *MacNiven v Westmorland Investments Ltd* [2003] 1 AC 311.

<sup>21</sup> *Europa Oil No 2* (1976) 1 WLR 464, 480 (Lord Wilberforce), quoting *Hallstrom Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634, 648 (Dixon J).

<sup>22</sup> *W T Ramsay v Inland Revenue Commissioners* [1982] AC 300, 323–4.

<sup>23</sup> Cf *Gartside v Inland Revenue Commissioners* [1968] AC 553, 617 (Lord Wilberforce).

may use the same terms (eg, ‘income’ or ‘capital’) in senses which are not coincident. Secondly, the transfer of the meaning (of a term such as ‘beneficial ownership’) from the general law to the revenue law may yield revenue outcomes at odds with the apparent policy of the taxation provision in question. Thirdly, in particular, the taxation provision may be enacted at a time when the general law (such as that respecting charitable purposes and public benefit) was in a state of development; some time later the legislation may remain but the general law may now operate differently as a criterion of revenue liability. Finally, there then may be a legislative response which not only seeks to reinstate the desired revenue outcome, but, in doing so, goes further and distorts the general law.

These themes appear across a range of taxation provisions and judicial decisions, examples of which now follow.

## V ‘CONSIDERATION’

A brief excursus into state revenue law is appropriate here. Stamp duty may be imposed by a criterion expressed as the ‘consideration’ for a conveyance or transfer or other transaction. The most generally understood meaning of ‘consideration’ is that associated with offer and acceptance in the formation of what Dixon J called ‘simple contracts’; but in conveyancing it is better understood more broadly as the money or value which moves the conveyance or transfer.<sup>24</sup> Here, then, the general law uses the same term in different senses. No doubt with a view to assisting the return to Revenue, stamp duty legislation, particularly with the contemporary emphasis upon ‘transactions’ rather than ‘instruments’, tends to adopt the broader meaning.

## VI WHAT IS A ‘TRUST’?

The judge-made law respecting trusts may be modified from time to time by state statute and this may not be repeated across the country. Is reference in a federal revenue law to a ‘trust’ to be read as ‘picking up’ trust law in its pristine condition before the intervention of state statute? The problem is neatly illustrated by s 8 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW). This declared to be charitable purposes for ‘the general law relating to charitable trusts’ the principal purposes of a fund

<sup>24</sup> *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143, 152. See, more recently, the judgment of Tate JA in *Lend Lease Development Pty Ltd v Commissioner of State Revenue* [2013] VSCA 207 (15 August 2013) [125]–[135].

established by James Hardie Industries NV.<sup>25</sup> At the federal level, did this bind the Commissioner in applying the revenue statutes he administered? The answer is determined by the response to the question of statutory construction posed in the second sentence above.

## VII ASSIGNMENTS

The importance of legal form in applying the general criterion in s 25 of the *ITAA 1936* that the taxpayer have 'derived' assessable income, was emphasised in two cases where liability turned upon the effectiveness of purported assignments.<sup>26</sup> These cases are leading authorities upon the general law, regarded as settling in Australia what previously had been a somewhat obscure subject.

*Norman v Federal Commissioner of Taxation* ('Norman')<sup>27</sup> concerned the voluntary assignments, by deed executed in 1956, of future interest on a loan repayable at will and of future dividends on company shares. The issue was whether these assignments were effective at general law, so that dividends and interest paid in the 1958 year of income were to be regarded as assessable income derived by the assignee, who was the wife of the assignor? The Commissioner successfully contended that both sums were assessable income derived by the husband. But this was the result of detailed analysis by the High Court of the law of assignments and of the effectiveness at law and in equity of the 1956 deed. Given the favourable result for the Revenue, there was no occasion to consider the application of s 260.

The taxpayer succeeded in the second assignments case, *Shepherd v Federal Commissioner of Taxation* ('Shepherd').<sup>28</sup> By deed poll executed in 1957, the taxpayer had assigned all his right title and interest 'in and to an amount equal to' 90 per cent of the income which might accrue over a three year period from royalties payable to the taxpayer under an agreement licensing a patent held by the taxpayer. Much turned upon the terms of the deed poll. It was held that 90 per cent of the royalties which accrued in the 1958 year of income was not assessable income derived by the taxpayer. This was so even,

<sup>25</sup> I am indebted to Professor J G Stumbles for this reference.

<sup>26</sup> Section 25 of the *ITAA 1936* was replaced by ss 6-5, 6-10 and 6-15 of the *Income Tax Assessment Act 1997* (Cth), and later repealed by *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth) sch 1 items 1, 52.

<sup>27</sup> (1963) 109 CLR 9.

<sup>28</sup> (1965) 113 CLR 385.

as Kitto J noted,<sup>29</sup> allowing for the presence in the *ITAA 1936* of s 19; the section deemed income to have been derived by the taxpayer where it had been ‘dealt with on his behalf or as he directs’, but ‘not actually paid over to him’. The tree, but not its fruit, had existed in 1957, and the taxpayer then had effectively disposed of 90 per cent of that tree.

The Parliament, however, took the view that with respect to assignments for a period of seven years and made after 22 October 1964, the assignor who retained the income producing asset should be taxed as if the assignments had not been made.<sup>30</sup> The result was the insertion by s 27 of the *Income Tax and Social Services Contribution Assessment Act (No 3) 1964* (Cth) of div 6A into pt III of the *ITAA 1936*.

In both *Norman* and *Shepherd*, the statutory term ‘derived’ was applied by regard to general law concepts, those dealing with the tricky subject of assignments of choses in action. It may be thought that the constitutional imperatives discussed above are more readily met in the safe house of criteria supplied there by the principles of law and equity, than by the indefinite operation of criteria expressed in terms of substance, effect and economic equivalence. But as *Norman* and *Shepherd* indicate, those general law principles themselves may be in an unsettled state.

More recently, in *Bluebottle UK Ltd v Deputy Federal Commissioner of Taxation* (*Bluebottle*),<sup>31</sup> the focus was upon s 255 of the *ITAA 1936*. This applied to persons having receipt, control or disposal of money belonging to a non-resident who derived income from a source in Australia. In *Bluebottle*, two non-resident companies held shares in a listed public company. Any right they enjoyed to receive a dividend was subject to those provisions of company law the effect of which was that the directors might fix a record date to limit those entitled to participate in a dividend to members registered on that date. This stipulation could not be severed from the debt or other legal chose in action which was the subject of purported assignments (here, for value). The assignments created rights between the parties to it. But as between the assignors and the company, the company had control of the dividend moneys belonging to the assignors, the two non-resident companies. As the Commissioner contended and the High Court accepted, this conjunction between company law and the law of assignments crossed the threshold for the operation of s 25.

<sup>29</sup> Ibid 394.

<sup>30</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1964, 2217 (Harold Holt).

<sup>31</sup> (2007) 232 CLR 598.



## VIII BENEFICIAL OWNERSHIP

It might have been thought when the *Income Tax and Social Services Contribution Assessment Act (No 3) 1964* (Cth) inserted the loss carry forward provision in s 80A<sup>32</sup> that it was clear enough what was involved in a requirement that at both ends of the temporal spectrum shares were ‘beneficially owned’ by the same persons. But the slippery nature of ‘beneficial ownership’ had been made apparent just two weeks before the passage of the Act through the House of Representatives. In *Commissioner of Stamp Duties (Qld) v Livingston*, Viscount Radcliffe had said it was mistaken to assume ‘that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable’.<sup>33</sup> This statement assumed great significance with the increasing use of what are described as unit trusts and discretionary trusts and for the revenue issues to which this development gave rise.<sup>34</sup>

What was the effect, for the phrase ‘beneficially owned’ in s 80A, of the supervening appointment of a liquidator to the holding company in question? What was the significance now of the 19<sup>th</sup> century view that upon liquidation, while the legal estate remained in the company, as if it were a trustee, ‘the beneficial interest is clearly taken out of the company’?<sup>35</sup> These issues were considered in *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)*.<sup>36</sup> The submission by the Revenue was that the chain of continuity required by s 80A had been lost; this was said to be so because:

‘beneficially owned’ meant the ability of Linter Group to use its shares in Linter Textiles for its own benefit, by selling them and applying the proceeds as it thought fit; the liquidator of Linter Group had had the power to cause the transmission of the ownership of the shares of Linter Group in Linter Textiles, but ‘beneficial ownership’ by Linter Group had been lost because the liquidator

<sup>32</sup> Section 80A was repealed by *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth) sch 1 items 1, 89.

<sup>33</sup> [1965] AC 694, 712 (Viscount Radcliffe for Viscount Radcliffe and Lords Reid, Evershed, Pearce and Upjohn).

<sup>34</sup> See, eg, *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 113–14 [29]–[32] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

<sup>35</sup> See *Re Oriental Inland Steam Co; Ex parte Scinde Railway Co* (1874) LR 9 Ch App 557, 560 (Mellish LJ).

<sup>36</sup> (2005) 220 CLR 592.

was bound to apply proceeds of sale in accordance with the statutory formula of distribution between creditors.<sup>37</sup>

However, the decision of the High Court was to the contrary. The change in control of the affairs of the company had no impact upon its beneficial ownership of its assets. The majority of the Court held:

By analogy with the general law, the circumscribing or suspension by reason of the appointment of the liquidator of the exercise by the usual organs of the company of the incidents of ownership of the assets of the company does not mean that the company itself has ceased to own beneficially its assets within the meaning of s 80A(1). Power to deal with an asset and matters of ownership or title are not interchangeable concepts.<sup>38</sup>

## IX EXECUTORY CONTRACTS

The goods and services tax ('GST') legislation provides striking instances of the interaction between the law of executory contracts and the fiscal objectives of that system when it selects as a sufficient criterion of liability one of the characteristics of that contract. The decided cases have produced results favourable to the Revenue.

It may come as a surprise to those who book and pay for Qantas and Jetstar flights that what they have purchased is not an unconditional promise to carry passengers and baggage on a particular flight; rather there is a promise to use best endeavours to carry passengers and baggage, having regard to the exigencies of the business operations of the airline. This is sufficient to constitute a contract.<sup>39</sup> It also is a 'taxable supply' for which consideration, being the airfare, was received; this was the holding, by majority, in *Federal Commissioner of Taxation v Qantas Airways Ltd* ('Qantas').<sup>40</sup> Some passengers did not take the flights and did not receive a refund. But, nevertheless, there had been 'taxable supplies' for which the airline was required to remit GST on the fares.

Given the structure of the GST legislation, it was no answer by the airlines that, on the proper construction of the contract, there was to be distilled, as its

<sup>37</sup> Ibid 612 [51] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

<sup>38</sup> Ibid 613 [55] (citations omitted).

<sup>39</sup> See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 64–5 (Gibbs CJ), 91–2 (Mason J), 116–17 (Wilson J), 120 (Deane J), 137–8 (Dawson J).

<sup>40</sup> (2012) 247 CLR 286, 299 [33] (Gummow, Hayne, Kiefel and Bell JJ).

‘essence, and sole purpose’,<sup>41</sup> actual carriage by air, and without this, there was no ‘taxable supply’. Critical to the interpretation by the Court of the statute (in particular s 29-5(1)) were the propositions:

The GST is attributable to the tax period in which there is received ‘any’ of the consideration, being the fares paid, or, before that receipt, the invoice is issued.

...

GST is not payable more than once by reason that the consideration is received in connection with an executory contract which involves more than one supply. Thus, GST on the consideration received is not payable in each of the tax periods in which a series of events occur in performance of an executory contract; the GST is payable once, in the tax period of the first payment or invoice.<sup>42</sup>

The proposition that a legal construct (in *Qantas*, an executory contract) which has several characteristics, each of which might involve ‘consideration’ for a ‘taxable supply’, enables the taxpayer to fix upon one or more of them to demonstrate the absence of criteria for a ‘taxable supply’, had earlier been rejected in *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd*.<sup>43</sup> It was sufficient for the Commissioner that at least one of those characteristics supplied a criterion to attract the tax. Thus, one of the characteristics of a deposit under a land contract was that upon payment it operated as security for the performance of the obligation of the purchaser to complete and was liable to forfeiture on that failure. This was sufficient for the Commissioner’s case.<sup>44</sup> The High Court held that it was no answer for the taxpayer that (a) the deposit also was ‘in the nature of damages’ because if the contract was later terminated by the vendor (as was the case here) the forfeited deposit would be brought into account where (as was not the relevant case) the vendor sought and recovered damages, and (b) those damages would not attract GST.<sup>45</sup>

<sup>41</sup> Ibid 291 [11], quoting *Qantas Airways Ltd v Federal Commissioner of Taxation* (2011) 195 FCR 260, 278 [56] (Edmonds and Perram JJ).

<sup>42</sup> (2012) 247 CLR 286, 290 [4]–[5] (Gummow, Hayne, Kiefel and Bell JJ).

<sup>43</sup> (2008) 236 CLR 342.

<sup>44</sup> Ibid 352 [28] (Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ).

<sup>45</sup> Ibid 350 [24].

## X TRUSTEE INCOME

Perhaps the most difficult interaction between revenue law and the general law has been (and remains) in the provisions in pt III div 6 of the *ITAA 1936* respecting trust income. At bottom is a point made by Professor Parsons:

Lawyers argue about what the word [income] means in a particular context. Trust law has a meaning for the word. Income tax law has another ... The income tax law meaning or meanings owe a good deal to trust law. But income tax law is fundamentally statute law ...<sup>46</sup>

Another significant consideration is the absence of a distinct legal personality for the trust. Throughout div 6, beginning with s 95, the expression ‘the income of a trust estate’, is not defined, and ‘trust’ is awkwardly defined as meaning:

- (a) an entity in the capacity of trustee (including an entity that manages a trust if there is no trustee); or
- (b) as the case requires a trust or trust estate.<sup>47</sup>

The term ‘trustee’ includes an executor, administrator, guardian, committee, receiver or liquidator and ‘every person ... acting in any fiduciary capacity’.<sup>48</sup> Thus, it was held in *Harmer v Federal Commissioner of Taxation* to be sufficient to attract pt III div 6 that moneys paid into court were held not for any beneficiary but for statutory purposes.<sup>49</sup>

The central provisions in s 97, shortly put, includes certain ‘income’ in the assessable income of certain ‘beneficiaries’. A critical expression in s 97 is a ‘beneficiary ... is presently entitled to a share of the income of the trust estate’. However, there is no further statutory explication of the terms ‘beneficiary’ or ‘presently entitled’, or ‘a share of the income’.

It was held in the joint reasons of the Court in *Federal Commissioner of Taxation v Bamford* (*Bamford*)<sup>50</sup> that the phrase ‘income of the trust estate’ was to be understood as income according to the general law of trusts,<sup>51</sup> and that the expression ‘share of the net income of the trust estate’ identified the

<sup>46</sup> R W Parsons, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (Lawbook, 1985) 8 [1.30].

<sup>47</sup> *ITAA 1936* s 317 (definition of ‘trust’).

<sup>48</sup> *Ibid* s 6 (definition of ‘trustee’).

<sup>49</sup> (1991) 173 CLR 264, 274 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

<sup>50</sup> (2010) 240 CLR 481.

<sup>51</sup> *Ibid* 505 [36] (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

proportion of the distributable income of the trust estate as ‘ascertained by the trustee according to appropriate accounting principles and the trust instrument’.<sup>52</sup> The Court emphasised that the treatment of receipts and outgoings by a trustee under the general law allowed for special provisions in the trust instrument (as was the position in the instant case); these could not be expected necessarily to correspond with the treatment of receipts and outgoings under the general provisions of the *ITAA 1936*.<sup>53</sup>

In *Bamford*, the Commissioner had proceeded, unsuccessfully, on the footing that although the trustee had treated a certain receipt as income available for distribution, s 97 had no application because the phrase ‘the income of the trust estate’ identified income according to ordinary concepts;<sup>54</sup> the Commissioner then assessed the trustee at the special rate under s 99A.<sup>55</sup>

What is significant is that, in argument, both sides in *Bamford* accepted that, on either construction of the legislation in question, examples readily could be given of consequent apparent unfairness in its administration. But we await a rewriting by the legislature of pt III div 6.

## XI TEMPORAL ISSUES

A particular temporal issue may arise from legislative adoption as a taxation criterion of an institution or principle of the general law. The general law develops with decisions at various stages in the court hierarchy. Does the revenue statute ‘pick up’ the general law in its (perhaps inconclusive) state at the time of enactment of the statute, or does it speak continuously to the present state of the case law?

These issues were at the forefront of the submissions in *Aid/Watch Inc v Federal Commissioner of Taxation* (*‘Aid/Watch’*).<sup>56</sup> A body having the endorsement of the Commissioner as a ‘charitable institution’ was exempt from liability to income tax under the *Income Tax Assessment Act 1997* (Cth), and to the GST and fringe benefits tax. The expression ‘charitable institution’ was

<sup>52</sup> Ibid 507–8 [45]–[46], quoting *Zeta Force Pty Ltd v Federal Commissioner of Taxation* (1998) 84 FCR 70, 74 (Sundberg J).

<sup>53</sup> *Bamford* (2010) 240 CLR 481, 500–1 [17] (French CJ, Gummow, Hayne, Heydon and Crennan JJ). See the terms of cls 4 and 7 of the deed of 9 February 1995: at 482–3.

<sup>54</sup> Not including what, such as capital gains, might be called ‘statutory income’: ibid 499 [10]. See now s 95AAB of the *ITAA 1936* and sub-div 115-C of the *Income Tax Assessment Act 1997* (Cth).

<sup>55</sup> *Bamford* (2010) 240 CLR 481, 499 [8] (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>56</sup> (2010) 241 CLR 539.

not defined. The term ‘charitable’ had both a popular meaning associated with benevolence and the relief of the needy, but since at least *Commissioners for Special Purposes of the Income Tax v Pemsel* (‘*Pemsel*’)<sup>57</sup> it has been treated as used in its technical sense when appearing in taxation legislation. But in what temporal sense was the technical meaning to be given to the term ‘charitable’? The answer in the joint reasons in *Aid/Watch* was:

Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.<sup>58</sup>

Their Honours added the further and important point:

Further, where, as here, the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.<sup>59</sup>

These considerations were determinative of the outcome in *Aid/Watch*. The Commissioner submitted that because *Aid/Watch* sought to generate public debate and to bring about changes in government policy and activity relating to the provision of foreign aid, there applied to *Aid/Watch* the ‘political disqualification principle’, associated with what had been said respectively by Lord Parker and Lord Wright in *Bowman v Secular Society Ltd*<sup>60</sup> and *National Anti-Vivisection Society v Inland Revenue Commissioners*.<sup>61</sup> The taxpayer successfully submitted to the High Court that such a principle should not be accepted in Australian law, particularly since the *Constitution*, as interpreted in 1997 by *Lange v Australian Broadcasting Corporation*,<sup>62</sup> recognised the public benefit in dissemination and receipt of information, opinions and arguments concerning government and political matters. The constitutional moorings of our legal system thus now contradict what in 1938

<sup>57</sup> [1891] AC 531.

<sup>58</sup> (2010) 241 CLR 539, 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>59</sup> Ibid. See further G E Dal Pont ‘Conceptualising “Charity” Parameters — The Prism of Public Benefit’ (2013) 7 *Journal of Equity* 1, 13–16.

<sup>60</sup> [1917] AC 406, 442.

<sup>61</sup> [1948] AC 31, 52.

<sup>62</sup> (1997) 189 CLR 520, 557–9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

had appeared to Dixon J to be the proposition that no 'coherent system of law can ... admit that objects which are inconsistent with its own provisions are for the public welfare'.<sup>63</sup>

## XII LEGISLATIVE RESPONSES

The Parliament, in the absence of referral of state powers pursuant to s 51(xxxvii) of the *Constitution*, lacks a general power to legislate with respect to trust law beyond its engagement by other federal laws, such as revenue law. The response by the Parliament to *Aid/Watch*<sup>64</sup> has been to define 'charity' and 'charitable purpose' in the Preamble to the *Charities Act 2013* (Cth) so as to provide 'clarity and certainty', but 'for the purposes of all Commonwealth law'.

The definition of 'charitable purpose' in s 12(1) of the *Charities Act 2013* (Cth) includes in para (l) the purpose of promoting or opposing change to any matter established by law, practice or policy in the Commonwealth, a State, a Territory or another country, being with respect to one or more of the purposes in paras (a)–(k) of the sub-section. The result in *Aid/Watch* appears undisturbed. A charitable purpose which fell within the fourth residual head of charitable purpose in *Pemsel*, as at the day before the commencement of the new legislation (on 1 January 2014), will be treated as falling within s 12(1), even if it otherwise would not do so.<sup>65</sup>

But what of purposes which fail to qualify at general law? One such religious purpose is that of the closed and contemplative order considered in *Gilmour v Coats*.<sup>66</sup> However, such a purpose would be exempted from the public benefit requirement in the definition of 'charity' in s 5 of the *Charities Act 2013* (Cth).<sup>67</sup> An apparent paradox thus is presented by the new federal legislation. A trust for a purpose may fail at general law because the purpose is not charitable, and a gift over or a resulting trust may come into operation instead; yet for the purposes of federal law, in particular revenue law, the trust

<sup>63</sup> *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396, 426.

<sup>64</sup> Previous consideration of the federal statutory privileges and concessions available to charitable trusts, associations and institutions is discussed in Dal Pont, above n 59, 7–10.

<sup>65</sup> *Charities (Consequential Amendment and Transitional Provisions) Act 2013* (Cth) sch 2 item 7.

<sup>66</sup> [1949] AC 426.

<sup>67</sup> See s 10(2) of the 2013 Act and the *Extension of Charitable Purposes Act 2004* (Cth).

may be recognised as effective and attract favourable treatment under the taxation system.<sup>68</sup>

It is one thing for the Parliament to require of superannuation funds that they meet certain criteria to obtain the benefit of particular revenue outcomes.<sup>69</sup> This may be done without the federal law being at odds with the general law of trusts, alterations to which is for state legislatures. It is another to treat as valid for federal law purposes a trust which fails at general law.

### XIII CONCLUSION

The interrelation and interaction between the *Constitution*, the common law and statute may trigger varied and complex issues. The general law respecting contracts, companies and trusts may be thought to present clear and stable criteria for the operation of revenue laws. But experience and the cases considered in this paper suggest the degree of clarity and stability offered by the general law for the administration of revenue law may be overrated. This is not to urge increased legislative resort to criteria of substance over legal form, with the attendant temptation to impose arbitrary imposts. But it is to urge legislative vigilance in measuring the policy ends sought by proposed measures against the selection of particular legal criteria to achieve them.

<sup>68</sup> Different considerations may apply to a charitable institution, such as Word Investments Ltd, whose assets are not held upon trust: *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204.

<sup>69</sup> See *A-G (Cth) v Breckler* (1999) 197 CLR 83, 100–3 [9]–[19] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).